



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 216 and 236

[Docket DARS-2016-0006]

RIN 0750-AI87

Defense Federal Acquisition Regulation Supplement: Prohibition on Use of any Cost-Plus System of Contracting for Military Construction and Military Family Housing Projects (DFARS Case 2015-D040)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2012 that amended title 10 of the United States Code by prohibiting any form of cost-plus contracting for military construction projects or military family housing projects.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**].

FOR FURTHER INFORMATION CONTACT: Mr. Tom Ruckdaschel, telephone 571-372-6088.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 81 FR 17050 on March 25, 2016. This final rule implements section 2801 of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81). Section 2801 amends 10 U.S.C. 2306 by prohibiting any form of cost-plus contracting for military construction projects or military family housing projects. Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes from the Proposed Rule

There are minor changes to the DFARS text from the proposed rule based on the public comments. A list of the specific cost-reimbursement contract types prohibited has been included at DFARS 216.301-3, Limitations. At DFARS 236.215 the terminology was expanded to state "contracts in connection with a military construction project or military family housing project" in lieu of "contracts for construction." Additionally, at DFARS 236.271, the reference to 236.271 to the prohibition on use of

"cost-plus" contracts was revised to refer to "cost-reimbursement" contracts.

B. Analysis of Public Comments

1. Support for the Rule

Comment: One respondent expressed support for the proposed rule, indicating that a blanket prohibition on cost-plus contracting in military construction and family housing projects is in the best interest of all parties, including small businesses and taxpayers.

Response: Noted.

2. Opposition to the Rule

Comment: One respondent opposed a blanket prohibition of cost-plus contracts stating that the rule excludes advances and innovations in the marketplace by prohibiting the selection of this form of contracting for construction projects.

Response: DoD does not have discretion in this rule as the prohibition is statutory and required by 10 U.S.C. 2306(c).

3. Term "Cost-plus Contract"

Comment: One respondent expressed concern that the term "cost-plus contract," as used in the proposed rule is nonstandard within title 48 of the Code of Federal Regulation, and as such should be further defined.

Response: In the context of the proposed DFARS revisions, "cost-plus" was interpreted as meaning those "cost-

reimbursement" contract types defined in Federal Acquisition Regulation 16.304, 16.305, and 16.306. Further delineation, however, is added to DFARS 216.301-3 to list the specific contract types prohibited: cost-plus-fixed-fee, cost-plus-award-fee, and cost-plus-incentive-fee. Additionally, the reference in DFARS 236.271 to use of any cost-plus contract is revised to refer to the list of cost-reimbursement contracts at DFARS 216.301-3.

4. Cross Reference to Statute

Comment: One respondent proposed that DoD remove the cross reference to 10 U.S.C. 2306(c) as the prohibition should remain notwithstanding any future changes that might be made to 10 U.S.C. 2306(c).

Response: It is a DFARS drafting convention to indicate in the regulations if they are based on a statute. This is helpful when considering future amendments to, or deviations from, the regulations. If the statute changes, appropriate changes to the regulations may be required.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

The purpose of this rule is to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 2801 of the National Defense Authorization Act for Fiscal Year 2012, which amends 10 U.S.C. 2306, to prohibit any form of cost-plus contracting for military construction projects or military family housing projects.

No comments were received from the public regarding the initial regulatory flexibility analysis.

There is minimal impact anticipated on small entities as a result of the proposed rule. Based on data available in the Federal Procurement Data System, there were only 19 cost-reimbursement type construction contracts awarded in fiscal year

2015, two of which were awarded to small businesses. There is already a general prohibition at DFARS 216.306 on certain cost-plus-fixed-fee contracts funded by a military construction appropriations act. The proposed rule expands this prohibition to all cost-plus contract types in connection with a military construction project or a military family housing project.

There are no new projected reporting, recordkeeping, and other compliance requirements of the rule.

There are no known significant alternatives to the rule that would meet the requirements of the statute.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 216 and 236

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 216 and 236 are amended as follows:

1. The authority citation for 48 CFR parts 216 and 236 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 216—TYPES OF CONTRACTS

2. Add section 216.301-3 to read as follows:

216.301-3 Limitations.

For contracts in connection with a military construction project or a military family housing project, contracting officers shall not use cost-plus-fixed-fee, cost-plus-award-fee, or cost-plus-incentive-fee contract types (10 U.S.C. 2306(c)). This applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the Armed Forces.

3. Amend section 216.306 by adding introductory text to paragraph (c) to read as follows:

216.306 Cost-plus-fixed-fee contracts.

(c) Limitations. For contracts in connection with a military construction project or military family housing project, see the prohibition at 216.301-3.

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PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

4. Add section 236.215 to read as follows:

236.215 Special procedures for cost-reimbursement contracts for construction.

For contracts in connection with a military construction project or military family housing project, see the prohibition at 216.301-3.

5. Revise section 236.271 to read as follows:

236.271 Cost-plus-fixed-fee contracts.

Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts (see 216.306(c)). See also 216.301-3 regarding the prohibition on the use of certain cost-reimbursement contracts in connection with a military construction project or military family housing project.

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